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January 7, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: August 10, 2004

Case No.: TIA-0158

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.<sup>1</sup>

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<sup>1</sup> [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy)

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period - in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a chemical operator and laborer at DOE's Fernald site. The Applicant worked at the site for nearly 15 years, from 1954 to 1969.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses - kidney cancer and brain cancer.

The Physician Panel rendered a negative determination on each claimed illness. For the kidney cancer, the Panel agreed that the Applicant had the illness but determined that the Worker did not have occupational exposures known to be related to kidney cancer. The Panel noted that kidney cancer is often associated with a history of smoking. For the brain cancer, the Panel agreed that the Worker had the illness but stated that the brain cancer represented metastasis of the kidney cancer.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

## II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure

during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

In her appeal, the Applicant maintains that the negative determinations are incorrect. She advances several arguments. First, the Applicant argues that her husband worked in a very dirty work environment. Second, the Applicant provides an excerpt from a medical textbook which she says discusses kidney cancer. Third, the Applicant argues that her husband worked at four different plants at the Fernald site and was exposed to uranium and organic chemicals and acids over the course of his employment. Lastly, the Applicant argues that although her husband smoked, radiation and smoking are known to have a synergistic effect and, in any event, her husband stopped smoking in 1981.

The Applicant's arguments are not a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. Although the Panel listed smoking as a known factor related to kidney cancer, the key determination here was that the Applicant's illness was not related to any workplace exposures. Also, the excerpt from the medical textbook provided by the Applicant discusses radiation therapy for kidney cancer, not radiation as a cause of kidney cancer. In any event, the Applicant's arguments are a mere disagreement with the Panel's medical judgment rather than an indication of panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0158 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: January 7, 2005